No. 80-771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

BURNHAM VAN SERVICE, INC.,
WITHERS VAN LINES OF MIAMI, INC.,
CENTRAL FORWARDING, INC.,
HOUSEHOLD GOODS CARRIERS' BUREAU, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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This brief is submitted in reply to the memorandum of respondents United States of America and Interstate Commerce Commission in opposition to the petition for writ of certiorari. This reply brief responds to the respondents' argument that the Commission cannot partially suspend a proposed tariff.

Respondents cite no authority for the proposition that the Commission cannot "implement a rate other than the one proposed in the carrier's tariff by suspending the tariff 'in part.' " They assert, however, that "a principal purpose

of the Interstate Commerce Act's Tariff system is to provide shippers and the public with certainty as to the applicable rates" and that such certainty would be "undermined" if the Commission could implement a rate other than the one sought by the carriers by partially suspending a proposed tariff (Memorandum, p. 4). This assertion is unfounded, as the facts of this case establish.

In the proceedings under review, the carriers filed tariff schedules with the Commission increasing rates and charges by five percent. The Commission suspended only so much of the tariff schedules as "would increase present rates and charges by more than three (3) percent." Following this order, the carriers immediately filed suspension supplements, as required by 49 C.F.R. § 1307.13, noting in bold print that only the rates and charges in excess of three percent had been suspended.[1]

Accordingly, the shippers and the public were made aware of the Commission's action in authorizing the three percent increase as soon as they would have been had the carriers filed the suspension supplements *and* new tariffs, as respondents claim they should have done. Clearly, refiling would have accomplished nothing except to delay implementation of the increase for the statutory notice period or for such lesser period as might have been authorized by the Commission. The imposition of a refiling requirement would thus cause more uncertainty as to the level of the applicable rates than the procedure used by the Commission here in suspending the rates in part and

[1]Contrary to respondents' suggestion in footnote 2, p. 4 of their Memorandum, 49 C.F.R. § 1307.13 clearly applies to partial suspensions such as that involved here and not only to partial suspensions of multiple point tariffs, where only the rates between some of the points are suspended. The rule applies to any "order suspending a schedule in part." (See Petition, p. 3).

permitting the unsuspended portion to take effect as scheduled.

Further, there is no merit to respondents' suggestion in footnote 2 at page 4 of the Memorandum that the Commission may not partially suspend a proposed tariff because it may "prescribe" a rate "only 'after a full hearing' ". The quoted language applies to rail carriers rather than motor carriers but, in any event, the Commission did not "prescribe" rates here any more than it did in *Trans-Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978). There this Court rejected the argument that the Commission had set rates without the required hearing by identifying the rates it would allow to go into effect during the suspension period. Here, as in *Trans-Alaska,* the carriers were free to reject the increase allowed by the Commission and pursue their other remedies under the Act, but they chose to accept it. This does not mean that the Commission "prescribed" the rates.

Respondents state that "neither *Trans-Alaska* nor *United States v. Chesapeake & Ohio R.R.,* 426 U.S. 500 (1976) *(Chessie)* compels a different result." As we have shown, however, the Court of Appeals misconceived and misapplied the holdings in those cases. They do not hold that the Commission's suspension power is *limited* as held by the Court of Appeals. Rather, they hold that the Commission's suspension power is extremely broad and that the Act "should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result." *Trans-Alaska Pipeline Rate Cases, supra,* 436 U.S. at 656. Since there is no language in the Act that precludes Commission action in suspending only part of a reate increase,[2] the *Trans-*

[2]Indeed, as shown in our Petition, the Commission has specific authority to modify the tariff filing requirements of the Act. (See Petition, p. 8).

Alaska and *Chessie* decisions do compel a different result from that reached by the Court of Appeals.

Finally, in footnote 3 at page 5 of their Memorandum, respondents attempt to distinguish *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278 (D.C. Cir., 1977), on the basis that the tariff involved there was composed of two parts while the tariff involved here "was an integral whole, which, therefore, could not be partially suspended." This is a distinction without a difference. If, as the respondents assert, the Commission is without *power* to partially suspend a tariff, it cannot make any difference whether the rates in the tariff are "separately stated" or not. Clearly the Court in *Commonwealth of Pennsylvania* recognized that the Commission does have power to partially suspend tariffs. Thus, that decision supports our position here.

Wherefore, petitioners respectfully request that a Writ of Certiorari be issued in this case.

Respectfully submitted,

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